IN THE JUSTICE OF THE PEACE COURT
OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY
COURT NO. 16
480 Bank Lane
Dover, DE 19904

John Luzetsky,	:	
Plaintiff,	:	
v.	:	**JP16-11-004254**
Lorraine Lake,	:	
Defendant.	:	

Michael P. Morton, Esq., appeared on behalf of plaintiff John Luzetsky.[1]

Lorraine Lake, defendant, appeared *pro se*.

ORDER

This landlord-tenant summary possession action, filed August 10, 2011, was originally disposed of by entry of a default judgment when the defendant failed to appear for trial on September 12, 2011. The defendant filed a timely motion to vacate the default judgment on September 21, 2011, and the motion to vacate was denied after a hearing on October 25, 2011. The defendant then appealed the denial of her motion to vacate to a three-judge panel of this Court pursuant to 25 *Del. C.* § 5717(a), asking that the case be heard *de novo.*[2] The appeal request was approved as to timeliness and form, and the matter was scheduled for a hearing on November 8, 2011. At the hearing, plaintiff moved for dismissal, and, after hearing argument, the Court dismissed the appeal for lack of jurisdiction. Although the Court's decision was announced from the bench in summary form, this is the Court's full written decision.

Pretrial Motion to Dismiss the Appeal

Plaintiff argued for dismissal on several grounds, including: (1) denial of the motion to vacate the default judgment was a sound decision because the defendant failed to show excusable neglect and that a different result would be likely if her motion to vacate had been granted; (2) the "Eviction Notice/Writ of Possession" entered in the case should not have been stayed to await appeal to a three-judge panel, and the decision to do so was legal error; and (3) an appeal pursuant to 25 *Del. C.* § 5717(a) is limited to cases in which a trial was conducted and judgment rendered after such trial.

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[1] Immediately prior to the hearing, the Court granted Brian Glancy, Esq.'s motion to withdraw as plaintiff's counsel, and permitted Michael P. Morton, Esq. to enter his appearance on behalf of the plaintiff.

[2] A trial *de novo* is a new trial, when the case is heard anew "as if it had not been heard before and as if no decision had been previously rendered." Black's Law Dictionary 300 (6th Ed. 1991).

25 *Del. C.* § 5717

The Court must first determine whether a three-judge panel has jurisdiction to hear an appeal from the denial of a motion to vacate a default judgment in a landlord-tenant summary possession action. An appeal *de novo* is governed by 25 *Del. C.* §§ 5715(a) and (c), which state in pertinent part:

> (a) Nonjury trials. With regard to nonjury trials, a party aggrieved by the judgment rendered in such proceeding may request in writing, within 5 days after judgment, a trial *de novo* before a special court comprised of 3 justices of the peace other than the justice of the peace who presided at the trial, as appointed by the Chief Magistrate or a designee, ...
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> * * *
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> (c) Jury trials. With regard to jury trials, a party aggrieved by the judgment rendered in such proceeding may request, in writing, within 5 days after judgment, a review by an appellate court comprised of 3 justices of the peace other than the justice of the peace who presided at the jury trial, as appointed by the Chief Magistrate or a designee. . . .

The language in this statute specifies that appeals to a three-judge panel are from **trials**, both jury and non-jury. The language enacted by the General Assembly does not mention decisions on motions to vacate default judgments or judgments resulting from other non-trial proceedings.[3]

Justice of the Peace Court Civil Rules 72 and 72.1

Turning to the Court's rules of procedure, Section IX of the Justice of the Peace Court Civil Rules provides two avenues of appeal of final judgments in Justice of the Peace Court civil cases. First, as a general rule, appeals are taken to the Court of Common Pleas (J.P. Civ. R. 72). Second, and importantly for this case, appeals in summary possession cases are made to a three-judge panel (J.P. Civ. R. 72.1), not to the Court of Common Pleas. Rule 72.1 states in pertinent part:

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[3] The language in the appeal sections likewise does not mention "non-suit" judgments. A "non-suit" judgment is a dismissal of the action for failure of the plaintiff to appear to prosecute the case. According to the Superior Court, the term "non-suit" 'is an outdated term which is seldom used in Delaware anymore. *Miles v. Justice of the Peace Court No. 13,* 1993 WL 488877 (Del. Super.). Black's Law Dictionary defines "nonsuit" as "a term broadly applied to a variety of terminations of an action which do not adjudicate issues on the merits," but also, "a judgment taken against a plaintiff who has failed to appear to prosecute his action or failed to prove his case." This authority also explains that, "[u]nder civil rules practice, the applicable term is 'dismissal.'" More importantly, however, a "non-suit is the legal equivalent of a default judgment, and has the effect of a final judgment on the merits," *Governor's Square Assoc., L.P. v. Bike Line Corp.,* 2001 WL 1555691 (Del.Com.Pl.); Justice of the Peace Court Civil Rule 41(b).

> **(c) Three judge panel.** An appeal following a summary possession trial shall be made to a three (3) judge panel comprised of three (3) judges other than the judge who presided at the trial.
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> **(d) Appeals *de novo*.** An appeal of a decision following a nonjury trial shall be a trial *de novo*.
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> * * *
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> **(e) Appeals on the record**. An appeal of a decision resulting from a jury trial shall be on the record. . . .

Like the appeal statute under 25 *Del. C.* § 5717, Justice of the Peace Court Civil Rule 72.1 specifies that appeals to a three-judge panel are from summary possession **trials,** both jury and non-jury.

Delaware Case Authority

Having reviewed the relevant statutes and the court's rules of procedure, the panel turned to Delaware cases that have examined this issue. Delaware's courts have generally been adamant that neither Superior Court nor its successor appellate court, the Court of Common Pleas, has jurisdiction to hear appeals from summary possession actions. This conclusion has been reached in part because the legislature has provided "the extraordinary provision for an appeal to a three justice court within the Justice of the Peace system…evidenc(ing) an express legislative intent to keep such matters out of the Superior Court." *Bomba's Restaurant & Cocktail Lounge, Inc.,* 389 A.2d 766 (Del. 1978); *Capano Investments v. Levenberg,* 564 A.2d 1130 (Del. 1989); *Smith v. Justice of the Peace Court No. 1,* 1990 WL 123051 (Del. Super.).

However, these cases originated from ***trials*** held in the Justice of the Peace Court, not judgments resulting from a party's default, or from a judgment by admission, or from a non-possession landlord-tenant action, such as a claim that a landlord has retaliated against a tenant, or another non-trial but nevertheless final judgment. In addition, although these cases stem from original ***trials*** in the Justice of the Peace Court, the rulings themselves do not specify the proceeding type when they interpret the three-judge panel appeal as being the ***only*** avenue of appeal in a possession case.

Cases brought about as a result of a petition for a writ of certiorari filed with the Superior Court have also provided that the right to appeal a landlord-tenant summary possession action is confined to a three-judge panel of Justices of the Peace, most recently *Maddrey v. Justice of the Peace Court 13,* 956 A.2d 1204 (Del. 2008). *Maddrey* resolved conflicts among Superior Court decisions on petitions for writs of certiorari, making clear that certiorari is limited to a review of "errors on the face of the record,"

i.e., the complaint, any written answer or response, and the docket entries, and that certiorari is not a procedural "end run" to permit an outright appeal of the case. Again, however, *Maddrey* involved a landlord-tenant summary possession case that went to trial at the Justice of the Peace Court level. As in other cases involving direct appeals to Superior Court or the Court of Common Pleas, *Maddrey* refers to "hearings" or "proceedings" throughout the decision and does not distinguish jury or non-jury trials as set forth in 25 *Del. C.* § 5717.

Other cases, like the instant case, involve the entry of a default judgment when the defendant failed to appear for trial or the entry of a nonsuit judgment, and the subsequent denial of a motion to vacate the judgment.[4] Case law in this procedural bailiwick has been more conflicted than in the other scenarios described here. Many times, the appellant filed an appeal with the Court of Common Pleas in reliance upon *Ney v. Polite,* 399 A.2d 527 (Del. 1979). *Ney* was a civil debt action filed in the Justice of the Peace Court which was dismissed when the plaintiff failed to appear for trial (and against whom a default judgment on a counterclaim was entered). The plaintiff filed a motion to vacate the default judgment, and when that motion was denied, attempted under the procedural rules of the time to file an intent to appeal to the Court of Common Pleas with the magistrate. The magistrate refused to allow the appeal. The Delaware Supreme Court ultimately ruled in *Ney* that an appeal to the Superior Court (the appellant court for Justice of the Peace Court at the time) may be taken from the *denial* of a motion to vacate a default judgment, and that the appeal will focus on the propriety of the denial order, not on the underlying default judgment itself.

Although *Ney* was a civil debt action, Superior Court has ruled that appeals based upon non-trial proceedings in summary possession actions should be accepted and decided in the Court of Common Pleas if an appeal from a denial decision is filed, citing *Ney* as at least partial authority for this conclusion. In *Gibson v. North Delaware Realty Co. Stoneybrook Townhomes,* 1996 WL 453414 (Del. Super.), Judge Herlihy stated:

> The appeal did not involve the underlying judgment but only the reasons for denying the motion to vacate. Now that the Court of Common Pleas has the jurisdiction once held by this Court, such appeals go to that court.
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> * * *
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> In sum, Gibson's initial appeal to the Court of Common Pleas was properly and timely taken. It would have been inappropriate to appeal the denial of her Rule 20(b) motion to a three-judge panel....*it was immaterial for this narrow appeal that the underlying original action was for summary possession.*"

(emphasis added).

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[4] It might well have been a nonsuit, a judgment by admission, or a pretrial dismissal of the complaint based on factors other than non-appearance in that a trial was not held, and thus, it is not clear on its face that the judgment is or is not appealable to a three-judge panel as envisioned by 25 *Del. C.* § 5717(a).

On point, Superior Court has ruled, in granting a petition to issue a writ of certiorari to Justice of the Peace Court, that the Justice of the Peace Court exceeded its jurisdiction when it vacated a nonsuit judgment without a hearing and referred the case directly to a three-judge panel for a hearing and decision, explaining that the applicable appeals statute, 25 *Del. C.* § 5717, applies only to ***trials***, defined as "a judicial examination and determination of issues between parties to an action. It is a proceeding which considers the merits of a case." *Miles v. Justice of the Peace Court No. 13,* 1993 WL 488877 (Del. Super.).

Superior Court has also ruled in other cases that appeals based on landlord-tenant controversies which do not involve a claim for possession may be taken to the appellate court (Superior Court until January 15, 1995 and the Court of Common Pleas thereafter). *Neitzelt v. Meera Management, LLC,* 2006 WL 1719976 (Del. Super.); *Alford v. Brandywine Mills Historic Associates,* 1988 WL 15399 (Del. Super.).

Judges in the Court of Common Pleas have ruled both that non-trial proceedings in summary possession cases are and are not appealable to that Court from the Justice of the Peace Court. In *Governor's Square Assoc., L.P. v. Bike Line Corp.,* 2001 WL 1555691 (Del.Com.Pl.), the Court ruled that a nonsuit judgment in a summary possession action may be directly appealed to the Court of Common Pleas, is governed by 10 *Del. C.* § 9570, and shall be heard *de novo.* The chief judge of the Court of Common Pleas has heard and issued rulings at least twice in unrelated summary possession appeals from the denial of a default judgment and a nonsuit judgment, without discussing the issue of jurisdiction to do so. *AMU Corp. v. Shamshad, LLC,* 2006 WL 1828334 (Del.Com.Pl.) and *Gillespie v. Chelsea on the Square Apts.,* 2008 WL 352131 (Del.Com.Pl.).

On the other hand, the Court of Common Pleas has ruled that appeal of a denial of a motion to vacate a default judgment in a summary possession action must be dismissed for lack of subject matter jurisdiction and that such an appeal should be heard by a three-judge panel of Justices of the Peace, stating 25 *Del. C.* § 5717 provides for such appeals. *Dorsey v. Cochran,* 2011 WL 809854 (Del.Com.Pl.). Interestingly, this decision rested in large part on the *Maddrey* decision, which stated that "a party aggrieved by an initial single judge's judgment in a summary possession hearing may request a trial *de novo* before a three judge Justice of the Peace panel. There the statutory process ends." This verbatim quote from *Maddrey* uses the word "hearing" as the original proceeding, whereas the statute itself uses the word "trial." At least two other Court of Common Pleas cases have similarly ruled that any proceeding in a summary possession action must be appealed to a Justice of the Peace Court three-judge panel. *D & F Properties v. Bransfield,* 2006 WL 925204 (Del.Com.Pl.) (involving appeal from the denial of a motion to vacate a default judgment); *Jarmon v. Owner's Management Co.,* 2004 WL 1859988 (Del.Com.Pl.) (involving appeal from the denial of a motion to set aside a judgment by admission).

* * *

The conflicting authority presented by these cases encourage a close reading of the cases, but a broad overview convinces this three-judge panel that it must be governed by the statute, and guided by the cases that provide support for the position that the statute is clear, not ambiguous, and that reliance upon the statute is the best guarantee that we follow the legislature's intentions.

The Justice of the Peace Court is a court of limited jurisdiction, and its jurisdiction and authority "is derived solely from statute." *Bomba's, supra.* If jurisdiction is not granted by statute, the Justice of the Peace Court does not have jurisdiction. As stated by the Delaware Superior Court in an even earlier case, "[j]ustices of the peace ought to know that they have no powers, or jurisdiction, excepting such as are conferred upon them by statute, and that those conferred by statute, can be exercised only in the manner, and as provided by statute." *In re Thorne,* 93 A. 557 (Del. Super. 1915). *See also* 10 *Del. C.* § 9202(d), which states: "The Justice of the Peace Court shall have and exercise such jurisdiction, both criminal and civil, as shall be conferred upon it by law."

The statute here, 25 *Del. C.* § 5717, is clear and unambiguous. Appeals to a three-judge panel of Justices of the Peace are from jury and non-jury ***trials.*** A "trial" is a judicial proceeding during which all parties appear and present evidence in support of their individual assertions. The Court examines the evidence admitted during the trial, applies the law to the facts in evidence, and decides the issue or issues in the case on their merits. A "default judgment" is not a decision on the merits of a case.[5] A default judgment is entered when a party fails to appear in a suit against that party, or fails to appear to prosecute its own complaint, or otherwise fails in any way to respond to the original complaint. Although the Court must determine there is a reasonable basis for the judgment, the Court does not hear the merits of the case as it would had all parties participated in a trial of the facts and argument on the application of the law to those facts.

Conclusion

The default judgment in this case was the result of the defendant's failure to appear at trial on September 12, 2011. Thereafter, the defendant moved the Court to vacate the default judgment. The Court conducted a hearing and denied defendant's motion in writing, stating the rationale therefor. At that point, defendant had an appealable order and could have filed an appeal with the Court of Common Pleas. The defendant chose instead to file an appeal to a three-judge panel. The sitting justice approved the appeal as to form and timeliness, and the appeal proceeded for assignment to a three-judge panel. When the defendant's choice was challenged by the landlord, she was unable to persuade the panel that this appeal was properly before the three-judge panel, and that the panel could act pursuant to the law if it heard the case on its merits *de novo* and issued a final judgment.

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[5] Although, for the purposes of appeal, default judgments and non-suit judgments are "final judgments."

The Court finds by unanimous vote that the panel lacks jurisdiction to hear an appeal from the denial of a motion to vacate a default judgment in a landlord-tenant summary possession.

NOW, THEREFORE, IT IS ORDERED:

(1) The appeal pursuant to 25 *Del. C.* § 5717 is **DISMISSED.**

(2) The clerk shall pay to the plaintiff John Luzetsky the bond in the amount of $1,200.00, which was posted by defendant Lorraine Lake as ordered by the Court pursuant to 25 *Del. C.* 5717(a).

(3) The stay on the writ of possession was lifted on November 18, 2011.

The Court announced its decision in open court on November 8, 2011 and reduced it to a summary writing on November 18, 2011. This is the Court's full written rationale for the decision.

IT IS SO ORDERED this 2nd day of December, 2011.

Robert B. Wall, Jr.
Justice of the Peace

Debora Foor
Justice of the Peace

Cathleen M. Hutchison
Justice of the Peace